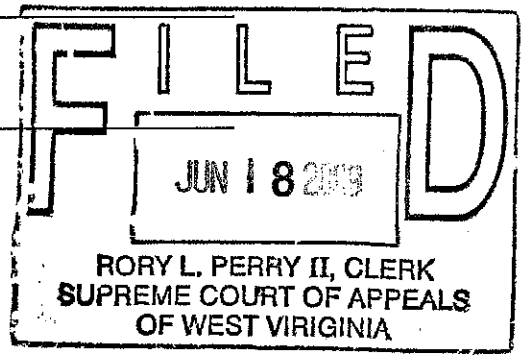
No.: 090857

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON



STATE OF WEST VIRGINIA ex rel., CORPORATION OF CHARLES TOWN, a Municipal Corporation,

PETITIONER,

v.

IN PROHIBITION UPON ORIGINAL JURISDICTION

HONORABLE DAVID H. SANDERS, Judge of the Circuit Court of Jefferson County; ROBERT W. FURR and JACKSON-PERKS POST NO. 71, INC.,

RESPONDENTS.

JACKSON-PERKS POST NO. 71, INC.'S RESPONSE TO CORPORATION OF CHARLES TOWN'S PETITION FOR WRIT OF PROHIBITION

Response to Petition for Writ of Prohibition Pursuant to
Order of Court Entered May 28, 2009
In Case No. 08-C-297
In the Circuit Court of Jefferson County, West Virginia

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I. Factual and Procedural Background

Robert W. Furr initiated this action in the Circuit Court of Jefferson County on July 24, 2008 against the Corporation of Charles Town, only, for injuries and damages allegedly sustained on February 14, 2007, when he slipped and fell in a public parking lot leased, operated and maintained by the Corporation of Charles Town. (App., Exh. 10). On or about February 13, 2009, Mr. Furr filed a Motion for Leave to Amend seeking to add Jackson-Perks Post No. 71, Inc., the owner of the parking lot, as a defendant. (App. Exh. 10). On February 17, 2009, the Circuit Court granted the Motion and Mr. Furr filed his Second Amended Complaint. (App., Exh. 1).

In his Second Amended Complaint, Mr. Furr alleged, in part, the following:

- That the Corporation of Charles Town has operated a public parking lot pursuant to a lease agreement with Jackson-Perks Post No. 71 that derives revenue from 33 parking meters installed by the Corporation of Charles Town. (App., Exh. 1, Second Amended Complaint, paragraphs 4-5).

- That the Corporation of Charles Town covenanted and agreed to keep the blacktop pavement in a reasonable state of repair, and to keep the parking lot free of snow and ice. (App., Exh. 1, Second Amended Complaint, paragraph 5; Exh. 2).

- That the operation of the parking lot by the Corporation of Charles Town is a proprietary, rather than governmental, function. (App., Exh. 1, Second Amended Complaint, paragraph 7).

- That the Corporation of Charles Town breached the lease agreement with Jackson-Perks Post No. 71, and that the parking lot was caused by Defendants, including the Corporation of Charles Town, to become worn and uneven resulting in low places in which water would collect, and during cold weather, the water would freeze in patches of black ice. (App., Exh. 1, Second Amended Complaint, paragraph 8).

- That the Plaintiff paid 25 cents in one of the meters and, while walking across the public parking lot, slipped on black near-invisible ice sustaining injury. (App., Exh. 1, Second Amended Complaint, paragraph 12).

On March 20, 2009, the Corporation of Charles Town filed its Motion for Judgment on the Pleadings and to Dismiss Second Amended Complaint, along with a Memorandum of Law, asserting that it was immune from liability pursuant to the Governmental Tort Claims and Insurance Reform Act, W.Va. Code § 29-12A-1 *et seq*. Specifically, the Corporation of Charles Town relied upon the immunity provisions of § 29-12A-5(a)(6), which provides as follows:

> (a) A political subdivision is immune from liability if a loss or claim results from:
>
> (6) Snow or ice conditions or temporary or natural conditions on any public way or other public place due to weather conditions, unless the condition is affirmatively caused by the negligent act of a political subdivision.

W.Va. Code § 29-12A-5(a)(6).

On April 3, 2009, Jackson-Perks Post No. 71 filed its Answer to the Second Amended Complaint, including a cross-claim against the Corporation of Charles Town for indemnity or contribution that incorporates Mr. Furr's allegations against the Corporation of Charles Town. (App., Exh. 3).

Mr. Furr and Jackson-Perks Post No. 71 filed Responses in opposition to the Corporation of Charles Town's Motion for Judgment on the Pleadings and to Dismiss Second Amended Complaint. (App., Exhs. 6, 8). The Corporation of Charles Town filed a Reply to Mr. Furr's Response. (App., Exh. 7). On May 28, 2009, the Honorable David H. Sanders entered an Order denying the Corporation of Charles Town's Motion for Judgment on the Pleadings and to Dismiss Second Amended Complaint. (App., Exh. 9). On or about June 10, 2009, the Corporation of Charles Town filed its Petition for Writ of Prohibition and Memorandum of Law, along with an Appendix.

The Corporation of Charles Town's Petition for Writ of Prohibition asserts that the Circuit Court of Jefferson County committed clear legal error in contravention of West Virginia Code § 29-12A-5(a)(6) and § 8-12-12 by denying its Motion for Judgment on the Pleadings and to Dismiss Second Amended Complaint.

For all of the reasons that follow, the Corporation of Charles Town is not immune from liability and this Honorable Court must deny the Corporation of Charles Town's Writ of Prohibition.

II. Standard of Review

The Supreme Court of Appeals of West Virginia has used prudence in granting relief through prohibition because "[p]rohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which having jurisdiction, they are exceeding their legitimate powers. . . ." Syl. Pt. 1, State ex rel. City of Martinsburg v. Sanders, 219 W.Va. 228, 632 S.E.2d 914 (2006). Where the Circuit Court is acting within its jurisdiction, this Court traditionally has examined the following factors to determine whether a writ of prohibition should issue:

> (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damage or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.

Syl. Pt. 4, in part, State ex rel. Hoover v. Berger, 199 W.Va. 12, 483 S.E.2d 12 (1996).

III. Argument

A. The Corporation of Charles Town is not immune from liability pursuant to the Governmental Tort Claims and Insurance Reform Act where the allegations in the Second Amended Complaint, and lease agreement with Jackson Perks Post No. 71, remove this claim from the immunity provisions of § 29-12A-5(a)(6).

In its Writ of Prohibition, the Corporation of Charles Town alleges that it is immune from liability because Mr. Furr failed to allege facts in his Second Amended Complaint that Charles Town "affirmatively caused" the icy conditions upon which Mr. Furr slipped and fell. (See Pet., p. 8). Charles Town also asserts that Mr. Furr's claim results from the icy conditions existing on the public parking lot as a result of weather conditions. (See Pet., p. 10). To the contrary, Mr. Furr's Second Amended Complaint plainly alleges that "The City . . . negligently allowed the subject parking lot to be improperly and dangerously maintained, in that the expansions and contractions caused by the forces of Nature over time resulted in a worn and uneven parking lot surface and contained low places in which water would collect, and during cold weather, said water would freeze in patches of black ice, making it dangerous and unfit for safe passage, all in violation of the lease agreement." (App., Exh. 1, paragraph 8).

In support of its position, Charles Town relies upon Porter v. Grant County Board of Education, 219 W.Va. 282, 633 S.E.2d 38 (2006). In Porter, the plaintiffs were injured after slipping and falling on a sidewalk on school grounds while walking to the gymnasium to watch a basketball game. The Supreme Court of Appeals held that the School Board was immune from liability when the only wrongful act alleged was the decision of the Board to hold the game on a day when school had been closed because of ice and snow. In interpreting the immunity provisions of § 29-12A-5(a)(6), the Court stated:

> It is obvious to this Court that the language of § 29-12A-5(a)(6) means that a political subdivision is immune from liability for injury caused by snow or ice

> placed on a sidewalk by the weather. Thus, if the weather caused snow or ice to accumulate on a sidewalk and the political subdivision fails to remove it, the political subdivision is immune from liability for any injury caused by the snow or ice. On the other hand, where the snow or ice is placed on the public way by an act of the political subdivision, and the snow or ice causes an injury, the political subdivision is not immune from liability. There are several possible ways in which a political subdivision could place snow or ice on a sidewalk. For example, an employee of the political subdivision could remove snow or ice from the roadway by throwing it onto the sidewalk. Also an employee of a political subdivision could permit a broken pipe or hose to leak water onto a sidewalk where the water subsequently freezes.

Porter, 633 S.E.2d at 42.

Thus, the Court held that "political subdivisions are not immune from liability for losses or claims occurring from an affirmative negligent act of the political subdivision resulting in snow or ice on public ways or other public places." Id. at 43. In this case, the Corporation of Charles Town is not immune where Mr. Furr has alleged that the accident resulted from the Corporation of Charles Town permitting the parking lot to become worn and uneven, resulting in low places where water would collect, and during cold weather, the water would freeze in patches of black ice. (See Exh. 1, Second Amended Complaint, paragraph 8). The ice alleged to be on the parking lot on February 14, 2007 was not placed there solely by the natural weather, but by the Corporation of Charles Town's affirmative negligence in creating and permitting a defect in the property, i.e., the low places in the parking lot where water would collect and freeze. This scenario is analogous to the defects of a broken pipe or leaking hose referenced by this Court Porter, where there would not be immunity. As alleged by Mr. Furr, this case is not a situation where snow and/or ice was on the parking lot simply due to adverse and naturally occurring weather phenomena, but rather by the affirmative negligent conduct of the Corporation of Charles Town in failing to properly maintain, repair and keep the parking lot free and clear of ice and snow. Specifically, the Corporation of Charles Town, as alleged by Mr. Furr, created a

situation where the parking lot area became worn and uneven resulting in low places where water would collect, and during cold weather, the water would freeze in patches of black ice. (App., Exh. 1, Second Amended Complaint, paragraph 8).

Because Charles Town is not entitled to immunity pursuant to W.Va. Code § 29-12A-5(a)(6), it can be held liable for damages in a civil action. W.Va. Code, § 29-12A-4 states, in pertinent, as follows:

> (c) Subject to sections five and six of this article, a political subdivision is liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by an act or omission of the political subdivision or any of its employees in connection with a governmental or proprietary function, as follows:
>
> (3) Political subdivisions are liable for injury, death, or loss to persons or property caused by their negligent failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, or public grounds within the political subdivision open, in repair, or free from nuisance, except that it is a full defense to such liability, when a bridge within a municipality is involved, that the municipality does not have the responsibility for maintaining or inspecting that bridge.

W.Va. Code. § 29-12A-4(c)(3)[1]; see also, Simpson v. City of Charleston, 22 F. Supp.2d 550 (S.D. W.Va. 2002) (city's motion for partial summary judgment denied where sidewalk was found to be out of repair for ordinary modes of travel).

It is clear that the subject parking lot was a public parking lot required to be maintained and repaired by the Corporation of Charles Town pursuant to the lease agreement with Jackson Perks Post No. 71. The lease agreement provides, in pertinent part, as follows:

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[1] Charles Town notes that Jackson-Perks Post No. 71 inadvertently misquoted this section of the Code in its Response to Charles Town's Motion for Judgment on the Pleadings and to Dismiss Second Amended Complaint, using the language "Except as otherwise provided by this article" as opposed to "Subject to sections five and six of this article." The undersigned apologizes for this error. However, the error is harmless, as sections five and six are both contained in the subject article.

> The lessee covenants and agrees that it shall maintain said leased premises as a public parking lot only and will keep the macadam, or blacktop, in a reasonable state of repair and shall keep the premises policed and free from trash, debris, weeds, snow and ice.

(App., Exh. 2, paragraph 4). Since the subject parking lot is a public lot (or public ground), and it has been alleged that the Corporation of Charles Town failed to keep the parking lot in repair as required by the lease agreement, Charles Town is subject to liability in this civil action pursuant to § 29-12A-4(c)(3). Certainly, walking in a public parking lot is an ordinary mode of travel to be expected after one exits a vehicle after parking. See Simpson, 22 F. Supp.2d at 556.

Furthermore, the Corporation of Charles Town in its Petition characterizes Mr. Furr's claim as one sounding only in tort. In addition, however, Mr. Furr has alleged that Charles Town breached its obligations under the lease agreement, which allegations were incorporated as part of Jackson-Perks Post No. 71's cross-claim against Charles Town. At least as between Jackson-Perks Post No. 71 and the Corporation of Charles Town, immunity is not applicable where the Corporation of Charles Town has contracted to perform maintenance and repair of the subject parking lot, which allegedly caused the Plaintiff's harm, especially when the Corporation of Charles Town is receiving revenue from the parking lot.

W.Va. Code § 8-12-12 specifically gives a municipality the power to enter into a lease with the owner of any real property for a parking lot, and provides that "all of the expenses of whatever kind, nature or character incident to the establishment, maintenance and operation of such parking facility . . . shall be paid solely from revenues derived from such parking facility, and from revenues derived from other parking facilities or meters not pledged to pay for such other parking facilities or meters." To permit the Corporation of Charles Town to enter into a valid and binding lease agreement, the breach of which allegedly caused the Plaintiff's harm, and then cloak the Corporation of Charles Town with immunity, would lead to an unjust result,

especially where the Corporation of Charles Town is receiving revenue from the parking lot. Pursuant to the lease agreement, the Corporation of Charles Town is liable to Jackson Perks Post No. 71 for indemnity as set forth in the cross-claim. See, Harvest Capital v. West Virginia Dept. of Energy, 211 W.Va. 34, 560 S.E.2d 509 (W.Va. 2002).

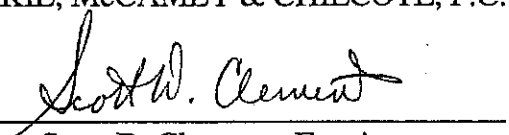
Thus, even if this Honorable Court were to determine that W.Va. Code § 29-12A-5(a)(6) provides Charles Town with immunity from tort liability in this action, which Jackson-Perks Post No. 71 denies, the Court should find that Charles Town's immunity defense is not applicable where it has entered into a valid and binding contract, and allegedly breached its obligations under the subject lease agreement. Although it appears that this Court has not before specifically addressed this issue, Courts in many other jurisdictions have held that immunity defenses do not extend to actions based on valid contracts. See e.g., Wiecking v. Allied Medical Supply Corporation, 391 S.E.2d 258 (Va. 1990) (holding that "the doctrine of sovereign immunity has no application in actions based upon valid contracts entered into by duly authorized agents of the government); Smith v. State of North Carolina, 222 S.E.2d 412 (N.C. 1976) (abolishing state sovereign immunity in the contractual context).

IV. Conclusion

For all of the foregoing reasons, Respondent, Jackson Perks Post No. 71, the American Legion of West Virginia, respectfully requests that this Honorable Court deny the Corporation of Charles Town's Petition for Writ of Prohibition.

Respectfully submitted,

DICKIE, McCAMEY & CHILCOTE, P.C.

By: 

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CERTIFICATE OF SERVICE

I, Scott D. Clements, Esquire, hereby certify that true and correct copies of the foregoing Response to Petition for Writ of Prohibition have been served this 17th day of June, 2009, by first-class U.S. Mail, postage pre-paid, to the following:

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